states only "that a violation of the rule against incentive compensation usually does not lead to financial loss to the United States – for any given student may well have enrolled, and been eligible, anyway." *Ibid.* As the court explained, this statement does not support OCU's argument "that a fraudulent certification does not violate the False Claims Act," because the FCA "provides for penalties even if (indeed, *especially* if) actual loss is hard to quantify, and at the margin contingent payments will lead to *some* unwarranted enrollments (and thus some unjustified federal disbursements)." *Ibid.* (emphases in the original).

REASONS FOR DENYING THE PETITION

The court of appeals held that the False Claims Act imposes liability not only for the direct submission of false claims to the government but also for making knowingly false statements concerning eligibility for government benefits that *cause* the submission of later claims for payment in a multiple-step government funding process. That decision reflects the common sense proposition that the FCA prohibits lying to obtain government benefits in all its forms, whether or not the initial lie to obtain eligibility for government funds is expressly reiterated in the actual request for money submitted to the government. That decision also tracks the plain language of the FCA, which applies broadly to any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2).

In addition to being correct, the court of appeals' decision does not conflict with decisions from any other circuit. Contrary to petitioner's arguments, the decision below does

not implicate the distinction some circuit courts have drawn (for purposes of implied certification liability) between "conditions of payment" and "conditions of participation" in federal funding programs. Nor does the decision below "conflict" with the Fifth Circuit's unpublished memorandum dispositions of cases involving similar claims. Given the lack of any conflict among the circuits on the issues presented in this case, and the interlocutory nature of the decision below, review by this Court is not warranted. The petition for a writ of certiorari should be denied.

A. The Court of Appeals' Decision Is Correct.

The court of appeals properly concluded that respondent's allegations that OCU lied about its compliance with the incentive compensation ban in order to obtain (and maintain) its eligibility to receive Title IV funds stated a valid claim for relief under the False Claims Act. Relying on the plain language of Section 3729(a)(2), which prohibits the knowing use of "a false record or statement to get a false or fraudulent claim paid or approved," 31 U.S.C. § 3729(a)(2), the court explained that "[t]he University 'uses' its phase-one application (and the resulting certification of eligibility) when it makes (or 'causes' a student to make or use) a phase-two application for payment." Pet. App. 3a. Thus, the court properly recognized that the FCA extends not merely to false claims submitted directly to the government but also to false statements that *cause* the government to pay out money, so long as there is an adequate causal nexus between the fraud and the payment. *Id.* at 3a-4a ("If a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork.").

The court of appeals' recognition that a person may be liable under the FCA not only for submitting a false claim directly to the government but also for causing others to submit false claims is not only consistent with the plain language of the FCA but also with a long line of decisions by this Court. *See United States v. Bornstein*, 423 U.S. 303, 309 (1976) (noting that FCA "gives the United States a cause of action against a subcontractor who causes a prime contractor to submit a false claim to the Government"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541-45 (1943) (holding electrical contractors who rigged bids on municipal contracts funded by federal government liable for causing municipalities to submit false claims); *Tanner v. United States*, 483 U.S. 107, 129 (1987) (noting prior cases in which the Court "recognized that the fact that a false claim passes through the hands of a third party on its way from the claimant to the United States does not release the claimant from culpability under the Act"). Indeed, this Court has recognized that the FCA extends broadly "to all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968). Likewise, the legislative history of the 1986 amendments confirms that the FCA applies "even though the services are provided as claimed if, for example, the claimant *is ineligible to participate in the program*." S. Rep. 345, 99th Cong., 2d Sess., at 9, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274 (emphasis added).

Nowhere in its petition does OCU acknowledge the straightforward textual basis in the FCA for the court of appeals' decision or the many decisions of this Court recognizing that false statements that *cause* the submission of false claims are actionable under the FCA. Indeed, OCU offers no argument whatsoever that the court of appeals' decision was wrong based upon the plain language of the FCA or any decisions by this Court. Instead, OCU contends primarily that the decision below

conflicts with decisions by other courts of appeals. *See* Pet. at 12-23. As explained in the next section, however, OCU's claim of "conflict" rests on a mis-characterization of what the court of appeals in this case actually held and exaggerated claims regarding an unpublished Fifth Circuit memorandum opinion summarily affirming the dismissal of FCA claims in a similar case.

B. The Court of Appeals' Decision Does Not Conflict With Precedential Decisions By Any Other Court of Appeals.

The court of appeals' essential holding – that OCU's knowing false promises to comply with a statutory prerequisite for receiving Title IV funds are actionable under Section 3729(a)(2) of the FCA because all later disbursements of student loan and grant funds depended on these false statements – is not contrary to the precedential decision of any other court of appeals. As the Court of Appeals in this case recognized:

> Although no published appellate decision to date has addressed the question whether a multi-stage process forecloses liability for fraud in the first stage, the answer is straightforward. The False Claims Act covers anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government".

Indeed, no court of appeals has ever held that a person may lie in the eligibility phase of a multi-stage process to obtain government benefits (*e.g.*, to establish threshold eligibility for veterans' benefits, hurricane relief benefits, or any other form of federal assistance) and then avoid FCA liability simply because the requests for money actually submitted to the government do not expressly reiterate the false statement upon which the person's eligibility for benefits depends.

In an effort to manufacture a circuit split, OCU completely ignores the straightforward textual basis for the court of appeals' decision and focuses instead on issues that are not implicated in that decision. For example, OCU argues that "Review is warranted to resolve a circuit split regarding whether FCA liability may arise from an uncertified statement that is not a precondition of payment." Pet. at 12. But the cases OCU cites in support of this contention all involved FCA liability under an "implied certification" theory – a theory that OCU acknowledges the court of appeals did *not* adopt. *See* Pet. at 15 n.4 ("The Seventh Circuit below did not find that OCU had made an implied certification and, indeed, the Seventh Circuit has not expressly considered the issue of implied certification.").[1] Because the court of appeals ruled exclusively on the ground that OCU's false statements in its PPAs were actionable under Section 3729(a)(2), no plausible basis exists for arguing that the decision below conflicts with decisions in other courts of appeals outlining the requirements for liability under an implied certification theory.

In any event, even assuming the implied certification decisions cited by OCU are deemed relevant, they do not conflict with the court of appeals' decision in this case. First, to the extent some of these decisions distinguish between false statements regarding general conditions of participation and "conditions of payment," *see United States ex rel. Mikes v. Straus*, 274 F.3d 687, 697 (2d Cr. 2001), these decisions do not conflict with the decision below because compliance

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1. No Seventh Circuit judge in regular active service requested a vote on OCU's Petition for Rehearing en banc and all of the judges on the panel voted to deny rehearing. Pet. App. 25a-26a.

with the incentive compensation ban is both a condition of participation *and* a condition of payment. As the court of appeals recognized, the Higher Education Act expressly conditions a school's "initial and continuing eligibility" to participate in Title IV programs upon compliance with the incentive compensation ban and other requirements. *See* 20 U.S.C. §§ 1094(a) & (a)(20); 34 C.F.R. 668.14(b)(22)(I). Because DOE has authority to withhold payment of funds based upon non-compliance with statutory requirements, *see* 20 U.S.C. § 1094(c)(1)(G); 34 C.F.R. 668.83, compliance with the incentive compensation ban is potentially relevant not only to DOE's decision whether to terminate a school's *participation* in Title IV programs but also to its decision whether to *pay* specific claims or withhold funds. Thus, the decision below is fully consistent with decisions requiring the false statements regarding conditions that are prerequisites to the receipt of government benefits. *See, e.g., United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996).

Likewise, OCU's contention that the FCA does not extend to "uncertified" false statements, *see, e.g.*, Pet. at 12, 17-20, is contrary to the plain language of the FCA and unsupported by decisions in any other court of appeals. As the court of appeals in this case properly recognized, it makes no difference whether OCU's promises to comply with the incentive compensation ban are "certifications" or promises; what matters is that they are express false statement regarding a condition that is a prerequisite to the receipt of government benefits. On its face, the FCA is not limited to false "certifications" but extends broadly to the use of a "false statement or record to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). As a result, no court of appeals has ever imposed an extra-statutory "certification" requirement for a false statement to be actionable. Instead, the courts have

routinely upheld FCA liability where there was no false "certification," so long as "the contract or extension of government benefits was obtained originally through false statements or fraudulent conduct." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 (4th Cir. 1999). Although at least one court of appeals has stated that "[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit," *Hopper*, 91 F.3d at 1266 (emphasis added), the court used that terminology solely because the false statement at issue in that case happened to be a "certification" of compliance with certain regulatory requirements, not because a "certification" was necessary for FCA liability. In short, OCU's suggestion that the decision below creates a conflict in the circuits on the question whether a false statement must be a "certification" in order to be actionable under the FCA is wholly without merit.

OCU also complains that, "[u]nder the reasoning of the Seventh Circuit, [it] would potentially be liable for its non-compliance with any ED regulation pertaining to student aid programs," because the PPA and applicable regulations make compliance with all statutory and regulatory requirements prerequisites for Title IV program eligibility. Pet. at 16. As the court of appeals recognized, however, the FCA does not impose liability simply for non-compliance with regulatory requirements; the statute forbids *knowing* false representations concerning compliance with conditions that are prerequisites for obtaining government benefits. Pet. App. 4a ("Tripping up on a regulatory complexity does not entail a knowingly false representation."). Thus, OCU's suggestion that the decision below conflicts with decisions in other circuits emphasizing that "[m]ere regulatory violations do not give rise to a viable FCA action," *see Hopper*, 91 F.3d at 1267, rests on a blatant mis-characterization of the decision.

Finally, OCU's contention that the decision below conflicts with an unpublished decision by the Fifth Circuit, Pet. at 20-23, is both misleading and wrong. The entire memorandum opinion on which OCU relies, *United States ex rel. Graves v. ITT Educational Servs, Inc.*, No. 03-20460, is included at Pet. App. 185a-187a. While that *per curiam* opinion affirms a published district court decision dismissing FCA claims similar to those in this case, *see* 284 F. Supp. 2d 487 (S.D. Tex. 2003), the opinion itself clearly states that "the Court has determined that this opinion should not be published and is *not precedent* except under the limited circumstances set forth in 5th Cir. R. 47.5.4." Pet. App. 185a (emphasis added). For the same reason, OCU's reliance on two other unpublished Fifth Circuit opinions which simply followed *Graves*, Pet. at 22, is also unavailing, because those decisions are not circuit precedent that could form the basis for a plausible claim of circuit conflict warranting certiorari. Even on their face, however, nothing in these decisions conflicts with the court of appeals' decision in this case.[2]

C. The Court of Appeals' Decision Is Interlocutory.

A final reason for denying the petition in this case is that the decision below is interlocutory. *See Brotherhood of Locomotive Firemen v. Bangor & Aroostook RR.*, 389 U.S.

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2. Although OCU suggests that the "*Graves* court" distinguished between "certifications" and general statements of compliance with regulatory conditions and concluded that compliance with the incentive compensation ban was not a condition of payment, Pet. at 21-22, this is highly misleading, because the language OCU cites appears exclusively in the district court's decision. None of this language or analysis is repeated anywhere in the Fifth Circuit's unpublished and expressly non-precedential memorandum opinion.

327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."). Absent extraordinary circumstances, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). Because petitioner has not identified any extraordinary circumstances warranting a departure from this rule, review of the interlocutory ruling by the court of appeals is not warranted.

In addition, because the legal question presented in this case is relatively novel, it would benefit from further percolation in the lower courts. A case involving similar legal issues is currently pending before the Ninth Circuit, *see United States ex rel. Hendow v. Univ. of Phoenix*, No. 04-16247 (argued Feb. 15, 2005), and that case will present a more suitable vehicle for review should any true conflict develop within the circuits.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LANE C. SIESKY
BARBER, SHOULDERS
& SIESKY, LLP
123 N.W. Fourth Street
Suite 402
Evansville, Indiana 47708
(812) 425-9211

Attorneys for Respondent